PARADISE OIL, WATER AND LAND DEVELOPMENT, INC.

IBLA 78-172 Decided November 17, 1982

Appeal from a decision of the Colorado State Office, Bureau of Land Management, determining the rental charges for right-of-way C-4437.

Vacated and remanded.

1. Appraisals -- Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Federal Land Policy and Management Act of 1976

   Where rental charges for a reservoir right-of-way are based upon an appraisal report that does not comport with Departmental standards, the decision determining rental charges will be vacated and the case remanded for a new appraisal.

APPEARANCES: Cecil D. Broyles, Vice President, Paradise Oil, Water and Land Development, Inc.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Paradise Oil, Water and Land Development, Inc. (Paradise), appeals from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated December 16, 1977, determining the rental charges for reservoir right-of-way C-4437. For the period August 5, 1974, to August 4, 1978, BLM determined the charges to be $1,060 per year; for the year commencing August 5, 1978, charges were set at $4,465.

The issue whether BLM has properly calculated the rental charges for the 5-year period beginning August 5, 1974, has been before this Board on two prior occasions. Paradise first appealed to this Board from a 1976 decision of the Colorado State Office imposing new rental charges for the subject right-of-way. Appellant had originally been issued this right-of-way effective August 5, 1969, and had paid a total rental charge of $4,075 for the first 5-year term. In January 1976, following an appraisal by BLM's staff appraiser, Paul Tittman, BLM sought to impose a charge of $31,000 for the next 5-year period commencing August 5, 1974. Appellant contended the rate was excessive and not fair market rental value and that it had not been contacted during the appraisal process. This Board in Paradise Oil, Water and Land Development, Inc., 26 IBLA 374 (1976), remanded the case to BLM so that appellant could be given an opportunity for a hearing on the subject.

A hearing was held November 18, 1977, in Denver, Colorado. Ralf Myers and Cecil Broyles, the president and chief engineer of Paradise, respectively, gave testimony relating to the fair market value of the right-of-way. They offered, on appellant's behalf, their own evaluation of the right-of-way based on an independent appraisal report prepared by Frank Nisley, Jr. (Exh. A). Their presentation reflected the views of Nisley, their expert appraiser, who had fixed the value of the right-of-way at $1,190 per year.

Tittman, the BLM staff appraiser, was in attendance at the hearing, but did not testify. Nor did he have any questions for Myers or Broyles. He chose to rely on his original appraisal report of October 23, 1975, until he could review all the documents submitted by appellant's witnesses.

Following this hearing, BLM on December 16, 1977, issued the decision under review, setting the rental rate of $1,060 per year for the 4-year period through August 4, 1978. The decision further stated, "As a result of the evidence presented at the hearing, it is hereby further determined that the rental for the 1-year period commencing on August 5, 1978, and ending on August 4, 1979 is $4,465."

BLM's 1976 decision, fixing rental charges at $31,000 for the identical 5-year term, was based upon a determination of the fair market value of the subject lands. BLM reached this determination by considering sales figures of three tracts of unimproved land in the same general area with close proximity to the Colorado River. The initial estimated fair market value average of these tracts was $800 per acre. Subsequent to the hearing, however, BLM considered two additional tracts mentioned in appellant's own appraisal report (sale #11 at $498 per acre and sale #21 at $505 per acre). BLM then reduced its valuation of the subject lands to $400 per acre from which it calculated the rental rate at issue for the year commencing August 5, 1978. Its evaluation of the subject land was based on the finding that the highest and best use of the land was for investment purposes. BLM acknowledged also that livestock grazing was an interim use awaiting the development of industrial and recreation applications.

In appellant's statement of reasons, it contended that the right-of-way should be evaluated based primarily on its grazing use. Appellant argued that BLM's rental charges are excessive and that the fair market rental value for the year beginning August 5, 1978, was based on fee land value figures derived from sales of lands not comparable to those involved in this right-of-way. Appellant stated that "in any appraisal report it is necessary to consider the totality of the report and not two isolated sales as used by Mr. Tittman in his reappraisal dated December 8, 1977." It contended that the parcels described as land sales #11 and #21 in Nisley's report "were obviously sold for sand and gravel pits and cannot be considered comparable to the R/W subject land involved."

By order of February 19, 1981, this Board requested further information of the parties to determine whether the special value of sales #11 and #21 was attributable to sand or gravel on these lands. By letter of June 16, 1982,
Paradise responded that parcel #11 is sand and gravel land with highway and river frontage; the land is level, Paradise maintains, and had a valuable

water right. Parcel #21 is described as having access from highways 6 and 24 and bordering the Colorado River. None of the lands in right-of-way C-4437 has these attributes, Paradise continues, and none is irrigated or has ditch rights. Further, Paradise maintains that rental charges should be reduced as a result of stipulations imposed by BLM on the use of the right-of-way lands.

BLM's response to our order of February 19, 1981, acknowledged that parcels #11 and #21 were purchased for the purpose of extracting gravel. Evidence of this purpose is shown by the removal of massive amounts of gravel for construction of Interstate Highway 70. BLM further acknowledged that the quantity and quality of gravel on the lands encumbered by right-of-way C-4437 are unknown and are believed to be far less than on sales #11 and #21.

Lands encumbered by right-of-way C-4437 lie in 6 parcels totaling approximately 117 acres. BLM notes, however, that legal access is lacking on all parcels except #1. "These conditions," BLM states, "cause the subject to be less valuable than the Nisley report sales Nos. 11 and 21. Further, the subject has no water rights and these two sales do, which causes the subject to be less valuable."

These statements of BLM indicate that it compared the lands in right-of-way C-4437 with superior lands in arriving at its valuation of $400 per acre for the right-of-way lands. At the same time, we note that BLM did not fix the valuation of the right-of-way lands as high as those of the superior lands. Although the December 16, 1977, decision does not set forth the basis for the $400 per acre figure, a memorandum from Tittman, dated only 8 days prior and reaching identical conclusions, contains the following comments:

> Based upon an evaluation of Exhibit A, the appraisal submitted by the applicant dated November 11, 1977, this appraiser recognizes 2 market transactions (Sales 11 & 21) which are indicative of values in close proximity to the Colorado River at similar size to the subject. NRL. [sic] Evaluating the new market data in concert with the market data contained in the appraisal under appeal, it is estimated that the 117.64+ acres would have a fair market value of $400.00 per acre for a total of $47,056.00 as $47,000.00. ($47,000.00 x .95 encumbrance x .10 return $4,465.00 ann. rent.) Based upon the above calculation, the rent due and payable for year 5 of the current rental term, commencing August 5, 1978 through August 4, 1979 is $4,465.00. [Emphasis supplied.]

Thus, BLM seems to have reached its $400 per acre valuation on the basis of 5 sales, 3 from its October 1975 appraisal, and sales #11 and #21. Per acre valuations for these parcels are $600; $1,028; $1,200; $498; and $505, respectively; each parcel is valued at a minimum of 24 percent above the lands in right-of-way C-4437. We are at a loss to understand how the $400 valuation was reached on the basis of these sales. BLM's method of appraisal was presumably based upon the comparable sales approach by which a valuation is estimated by examining sales of comparable property. Uniform

Appraisal Standards for Federal Land Acquisitions (1973) at 9. Hyatt Lake Homeowners Association, 48 IBLA 159, 161 (1980). While we acknowledge that parcels used in the comparable sales approach are unlikely to be comparable in all respects, BLM's response is silent in stating how sales #11 and #21 are comparable in any respect. BLM's consideration of these two parcels following the November 1977 hearing was presumably to improve on the per-acre valuation existing prior thereto ($800 per acre). We fail to see how consideration of these parcels refined this valuation.

BLM's response to our order also contained the following brief paragraph: "Acquisition of market data for the fifth year rental estimate (August 1979-August 1980) would be costly, time consuming and exceed the income to be received if fair annual rental for the period could be collected, which probably lies somewhere between $1,190 and $2,850." This paragraph, by itself, is an acknowledgement by BLM that its rental charge in the amount of $4,465 for the year commencing August 5, 1978, is excessive. The statement, however, is not without its shortcomings, because it incorrectly fixes the fifth year of right-of-way C-4437 as commencing in August 1979 rather than in August 1978. In any event, the $4,465 rental charged to appellant far exceeds the charge which BLM now acknowledges should be between $1,190 and $2,850.

No issue appears as to the rental charge by BLM for the 4-year period beginning August 5, 1974. Indeed, appellant's own rental appraisal ($1,190 per year) exceeds the amount charged by BLM ($1,060 per year).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office determining rental charges for the year commencing August 5, 1978, to be $4,465 is vacated and the case file is remanded for preparation of a new rental determination.

Anne Poindexter Lewis
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Douglas E. Henriques
Administrative Judge